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HOUSE BILL 311

43RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 1998

INTRODUCED BY

R. DAVID PEDERSON

AN ACT

**RELATING TO APPOINTMENT OF CONSERVATORS OR GUARDIANS;
AUTHORIZING PUBLIC ACCESS TO LIMITED INFORMATION REGARDING THE
APPOINTMENT OF A CONSERVATOR OR GUARDIAN; AMENDING SECTIONS OF
THE NMSA 1978.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. Section 32A-6-15 NMSA 1978 (being Laws 1995,
Chapter 207, Section 17) is amended to read:**

"32A-6-15. DISCLOSURE OF INFORMATION. --

**A. Except as otherwise provided in the Children's
Mental Health and Developmental Disabilities Act, no person
shall, without the authorization of the child, disclose or
transmit any confidential information from which a person well
acquainted with the child might recognize the child as the
described person or any code, number or other means that could**

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1 be used to match the child with confidential information
2 regarding him.

3 B. When evidence exists that a child fourteen
4 years of age or older, whose consent to disclosure of
5 confidential information is sought, is incapable of giving or
6 withholding valid consent and does not have a treatment
7 guardian appointed by a court, the person seeking the
8 authorization shall petition the court for the appointment of
9 a treatment guardian to make a decision for the child. When
10 the child is less than fourteen years of age, the child's
11 parent, guardian or legal custodian is authorized to consent
12 to disclosure on behalf of the child.

13 C. Authorization from the child shall not be
14 required for the disclosure or transmission of confidential
15 information in the following circumstances:

16 (1) when the request is from a mental health
17 or developmental disability professional or from an employee
18 or trainee working with mentally disordered or developmentally
19 disabled persons, to the extent their practice, employment or
20 training on behalf of the child requires that they have access
21 to the information;

22 (2) when the disclosure is necessary to
23 protect against a clear and substantial risk of imminent
24 serious physical injury or death inflicted by the child on
25 himself or another;

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1 (3) when the disclosure of the information to
2 the parent, guardian or legal custodian is essential for the
3 treatment of the child;

4 (4) when the disclosure of the information is
5 to the primary caregiver of the child and the disclosure is
6 only of information necessary for the continuity of the
7 child's treatment in the judgment of the treating clinician
8 who discloses the information;

9 (5) when the disclosure is to an insurer
10 contractually obligated to pay part or all of the expenses
11 relating to the treatment of the child at the residential
12 facility. The information disclosed shall be limited to data
13 identifying the child, facility and treating or supervising
14 physician and the dates and duration of the residential
15 treatment. It shall not be a defense to an insurer's
16 obligation to pay that the information relating to the
17 residential treatment of the child, apart from information
18 disclosed pursuant to this section, has not been disclosed to
19 the insurer; or

20 (6) when the disclosure is to a protection
21 and advocacy representative pursuant to the federal
22 Developmental Disabilities Assistance and Bill of Rights Act
23 and the federal Protection and Advocacy for Mentally Ill
24 Individuals Amendments Act of 1991.

25 D. No authorization given for the transmission or

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1 disclosure of confidential information shall be effective
2 unless it:

- 3 (1) is in writing and signed; and
4 (2) contains a statement of the child's right
5 to examine and copy the information to be disclosed, the name
6 or title of the proposed recipient of the information and a
7 description of the use that may be made of the information.

8 E. The child has a right of access to confidential
9 information about himself and has the right to make copies of
10 any information about himself and submit clarifying or
11 correcting statements and other documentation of reasonable
12 length for inclusion with the confidential information. The
13 statements and other documentation shall be kept with the
14 relevant confidential information, shall accompany it in the
15 event of disclosure and shall be governed by the provisions of
16 this section to the extent the statements or other
17 documentation contain confidential information. Nothing in
18 this subsection shall prohibit the denial of access to the
19 records when a physician or other mental health or
20 developmental disabilities professional believes and notes in
21 the child's medical records that the disclosure would not be
22 in the best interests of the child. In all cases, the child
23 has the right to petition the court for an order granting
24 access.

25 F. Information concerning a child disclosed under

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1 this section shall not be released to any other person, agency
2 or governmental entity or placed in files or computerized data
3 banks accessible to any persons not otherwise authorized to
4 obtain information under this section.

5 G. Nothing in the Children's Mental Health and
6 Developmental Disabilities Act shall limit the confidentiality
7 rights afforded by federal statute or regulation.

8 ~~[H. Nothing in this section shall prohibit a clerk~~
9 ~~of a district court from providing to any person authorized~~
10 ~~under Sections 47-4-1 through 47-4-8 NMSA 1978 to conduct~~
11 ~~abstracter's business or any person authorized pursuant to~~
12 ~~Chapter 59A NMSA 1978 to conduct business as a title insurer~~
13 ~~or title insurance agent within New Mexico information~~
14 ~~concerning the appointment of a guardian or conservator~~
15 ~~pursuant to Sections 45-5-201 through 45-5-432 NMSA 1978;~~
16 ~~provided that the information shall be limited to:~~

- 17 (1) ~~docket entries;~~
- 18 (2) ~~date of the proceeding, appointment and~~
19 ~~termination;~~
- 20 (3) ~~duration and type of the guardianship or~~
21 ~~conservatorship;~~
- 22 (4) ~~limitations, if any, on the powers of the~~
23 ~~guardian or conservator; and~~
- 24 (5) ~~the name and other information necessary~~
25 ~~to identify the ward; provided, however, the disclosure shall~~

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1 ~~not include any diagnostic treatment or other medical~~
2 ~~information.]"~~

3 Section 2. Section 43-1-19 NMSA 1978 (being Laws 1977,
4 Chapter 279, Section 18, as amended) is amended to read:

5 "43-1-19. DISCLOSURE OF INFORMATION. --

6 A. Except as otherwise provided in the code, no
7 person shall, without the authorization of the client,
8 disclose or transmit any confidential information from which a
9 person well acquainted with the client might recognize the
10 client as the described person, or any code, number or other
11 means ~~[which]~~ that can be used to match the client with
12 confidential information regarding him.

13 B. Authorization from the client shall not be
14 required for the disclosure or transmission of confidential
15 information in the following circumstances:

16 (1) when the request is from a mental health
17 or developmental disability professional or from an employee
18 or trainee working with mentally disordered or developmentally
19 disabled persons, to the extent their practice, employment or
20 training on behalf of the client requires that they have
21 access to such information;

22 (2) when such disclosure is necessary to
23 protect against a clear and substantial risk of imminent
24 serious physical injury or death inflicted by the client on
25 himself or another;

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1 (3) when the disclosure of such information
2 is to the primary caregiver of the client and the disclosure
3 is only of information necessary for the continuity of the
4 client's treatment in the judgment of the treating physician
5 or certified psychologist who discloses the information; or

6 (4) when such disclosure is to an insurer
7 contractually obligated to pay part or all of the expenses
8 relating to the treatment of the client at the residential
9 facility. The information disclosed shall be limited to data
10 identifying the client, facility and treating or supervising
11 physician and the dates and duration of the residential
12 treatment. It shall not be a defense to an insurer's
13 obligation to pay that the information relating to the
14 residential treatment of the client, apart from information
15 disclosed pursuant to this section, has not been disclosed to
16 the insurer.

17 C. No authorization given for the transmission or
18 disclosure of confidential information shall be effective
19 unless it:

20 (1) is in writing and signed; and
21 (2) contains a statement of the client's
22 right to examine and copy the information to be disclosed, the
23 name or title of the proposed recipient of the information and
24 a description of the use [~~which~~] that may be made of the
25 information.

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1 D. The client has a right of access to
2 confidential information about himself and has the right to
3 make copies of any information and to submit clarifying or
4 correcting statements and other documentation of reasonable
5 length for inclusion with the confidential information. The
6 statements and other documentation shall be kept with the
7 relevant confidential information, shall accompany it in the
8 event of disclosure and shall be governed by the provisions of
9 this section to the extent they contain confidential
10 information. Nothing in this subsection shall prohibit the
11 denial of access to such records when a physician or other
12 mental health or developmental disabilities professional
13 believes and notes in the client's medical records that such
14 disclosure would not be in the best interests of the client.
15 In any such case, the client has the right to petition the
16 court for an order granting such access.

17 E. Where there exists evidence that the client
18 whose consent to disclosure of confidential information is
19 sought is incapable of giving or withholding valid consent and
20 the client does not have a guardian or treatment guardian
21 appointed by a court, the person seeking such authorization
22 shall petition the court for the appointment of a treatment
23 guardian to make a substitute decision for the client, except
24 that if the client is less than fourteen years of age, the
25 client's parent or guardian is authorized to consent to

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1 disclosure on behalf of the client.

2 F. Information concerning a client disclosed under
3 this section shall not be released to any other person, agency
4 or governmental entity or placed in files or computerized data
5 banks accessible to any persons not otherwise authorized to
6 obtain information under this section.

7 G. Nothing in the code shall limit the
8 confidentiality rights afforded by federal statute or
9 regulation.

10 ~~[H. Nothing in this section shall prohibit a clerk~~
11 ~~of a district court from providing, to any person authorized~~
12 ~~under Sections 47-4-1 through 47-4-8 NMSA 1978 to conduct~~
13 ~~abstracter's business or any person authorized pursuant to~~
14 ~~Chapter 59A NMSA 1978 to conduct business as a title insurer~~
15 ~~or title insurance agent within New Mexico, information~~
16 ~~concerning the appointment of a guardian or conservator~~
17 ~~pursuant to Sections 45-5-201 through 45-5-432 NMSA 1978;~~
18 ~~provided that such information shall be limited to:~~

19 (1) ~~docket entries;~~

20 (2) ~~date of the proceeding, appointment and~~
21 ~~termination;~~

22 (3) ~~duration and type of the guardianship or~~
23 ~~conservatorship;~~

24 (4) ~~limitations, if any, on the powers of the~~
25 ~~guardian or conservator; and~~

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1 (6) the names and addresses, as far as known
2 or as can reasonably be ascertained, of the persons most
3 closely related by blood or marriage to the alleged
4 incapacitated person;

5 (7) the name and address of the person or
6 institution having the care and custody of the alleged
7 incapacitated person;

8 (8) the names and addresses of any other
9 incapacitated persons for whom the proposed guardian is acting
10 if the proposed guardian is an individual;

11 (9) the reasons the appointment of a guardian
12 is sought and the interest of the petitioner in the
13 appointment;

14 (10) the steps taken to find less restrictive
15 alternatives to the proposed guardianship; and

16 (11) the qualifications of the proposed
17 guardian.

18 B. Notice of a petition under this section for the
19 appointment of a guardian and the hearing on the petition
20 shall be given as provided in Section 45-5-309 NMSA 1978.

21 C. After the filing of a petition, the court shall
22 set a date for hearing on the issues raised by the petition.
23 Unless an alleged incapacitated person already has an attorney
24 of his own choice, the court shall appoint an attorney to
25 represent him. The court-appointed attorney in the proceeding

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1 shall have the duties of a guardian ad litem, as set forth in
2 Section 45-5-303.1 NMSA 1978.

3 D. The person alleged to be incapacitated shall be
4 examined by a qualified health care professional appointed by
5 the court who shall submit a report in writing to the court.

6 The report shall:

7 (1) describe the nature and degree of the
8 alleged incapacitated person's incapacity, if any, and the
9 level of the respondent's intellectual, developmental and
10 social functioning; and

11 (2) contain observations, with supporting
12 data, regarding the alleged incapacitated person's ability to
13 make health care decisions and manage the activities of daily
14 living.

15 E. The court shall also appoint a visitor who
16 shall interview the person seeking appointment as guardian and
17 the person alleged to be incapacitated. The visitor shall
18 also visit the present place of abode of the person alleged to
19 be incapacitated and the place where it is proposed he will be
20 detained or reside if the requested appointment is made. The
21 visitor shall evaluate the needs of the person alleged to be
22 incapacitated and shall submit a written report to the court.
23 The report shall include a recommendation regarding the
24 appropriateness of the appointment of the proposed guardian.
25 The report to the court shall also include recommendations

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1 regarding:

2 (1) those aspects of his personal care that
3 the alleged incapacitated person can manage without
4 supervision or assistance;

5 (2) those aspects of his personal care that
6 the alleged incapacitated person could manage with the
7 supervision or assistance of support services and benefits;
8 and

9 (3) those aspects of his personal care that
10 the alleged incapacitated person is unable to manage without
11 the supervision of a guardian.

12 Unless otherwise ordered by the court, the appointment of
13 the visitor terminates and the visitor is discharged from his
14 duties upon entry of the order appointing the guardian and
15 acceptance of the appointment by the guardian.

16 F. A person alleged to be incapacitated shall be
17 present at the hearing on the issues raised by the petition
18 and any response to the petition unless the court determines
19 by evidence that it is not in the alleged incapacitated
20 person's best interest to be present because of a threat to
21 the health or safety of the alleged incapacitated person or
22 others as determined by the court.

23 G. The court upon request or its own motion may
24 conduct hearings at the location of the alleged incapacitated
25 person who is unable to be present in court.

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1 H. The rules of evidence shall apply and no
2 hearsay evidence that is not otherwise admissible in a court
3 shall be admitted into evidence except as otherwise provided
4 in this article. There is a legal presumption of capacity,
5 and the burden of proof shall be on the petitioner to prove
6 the allegations set forth in the petition. Such proof [~~must~~]
7 shall be established by clear and convincing evidence.

8 I. A record of the proceedings shall be made if
9 requested by the alleged incapacitated person or his attorney
10 or when ordered by the court. Records, reports and evidence
11 submitted to the court or recorded by the court shall be
12 confidential, except that the public shall be granted access
13 to the following information:

14 (1) docket entries;

15 (2) date of the proceeding, appointment and
16 termination;

17 (3) duration of the guardianship; and

18 (4) the name and other information necessary
19 to identify the alleged incapacitated person.

20 J. Notwithstanding the provisions of Subsection I
21 of this section, any disclosure of information shall not
22 include any diagnostic information, treatment information or
23 other medical or psychological information.

24 [~~J.~~] K. The issue of whether a guardian shall be
25 appointed for the alleged incapacitated person shall be

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1 determined by the court at a closed hearing unless the alleged
2 incapacitated person requests otherwise.

3 K. Upon request of the petitioner or alleged
4 incapacitated person, the court shall schedule a jury trial."

5 Section 4. Section 45-5-407 NMSA 1978 (being Laws 1975,
6 Chapter 257, Section 5-407, as amended) is amended to read:

7 "45-5-407. PROCEDURE FOR COURT APPOINTMENT OF A
8 CONSERVATOR. --

9 A. Upon receipt of a petition for appointment of a
10 conservator or other protective order because of minority, the
11 court shall set a date for hearing on the matters alleged in
12 the petition. If at any time in the proceeding the court
13 finds the minor is or may be inadequately represented, it may
14 appoint an attorney to represent the minor, giving
15 consideration to the choice of the minor if fourteen years of
16 age or older. An attorney appointed by the court to represent
17 a minor shall represent and protect the interests of the
18 minor.

19 B. Upon receipt of a petition for appointment of a
20 conservator for reasons other than minority, the court shall
21 set a date for hearing. Unless the person to be protected is
22 already represented by an attorney of his own choice, the
23 court shall appoint an attorney to represent him in the
24 proceeding. The court-appointed attorney shall have the
25 duties of a guardian ad litem as set forth in Section

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1 45-5-404.1 NMSA 1978.

2 C. If the petition is for the appointment of a
3 conservator for an incapacitated person, the person to be
4 protected shall be examined by a qualified health care
5 professional appointed by the court who shall submit a report
6 in writing to the court. The report shall:

7 (1) describe the nature and degree of the
8 person's incapacity, if any, and the level of the
9 intellectual, developmental and social functioning of the
10 person to be protected; and

11 (2) contain observations, with supporting
12 data, regarding the ability of the person to be protected to
13 manage his estate or financial affairs.

14 D. The court shall also appoint a visitor who
15 shall interview the person seeking appointment as conservator
16 and the person to be protected. The visitor shall also visit
17 the present place of residence of the person to be protected.
18 The visitor shall evaluate the needs of the person to be
19 protected and shall submit a written report to the court. The
20 report shall include a recommendation regarding the
21 appropriateness of the appointment of the proposed
22 conservator. The report shall also include recommendations
23 regarding:

24 (1) those aspects of his financial affairs
25 that the person to be protected can manage without supervision

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1 or assistance;

2 (2) those aspects of his financial affairs
3 that the person to be protected could manage with the
4 supervision or assistance of support services and benefits;
5 and

6 (3) those aspects of his financial affairs
7 that the person to be protected is unable to manage even with
8 the supervision or assistance of support services and
9 benefits.

10 Unless otherwise ordered by the court, the appointment of
11 the visitor terminates and the visitor is discharged from his
12 duties upon entry of the order appointing the conservator and
13 acceptance of the appointment by the conservator.

14 E. The person to be protected shall be present at
15 the hearing on the issues raised by the petition and any
16 response to the petition, unless the court determines it is
17 not in the best interest of the person for whom a conservator
18 is sought to be present because of a threat to the health or
19 safety of the person for whom a conservator is sought or
20 others as determined by the court. The court upon request or
21 its own motion may conduct hearings at the location of the
22 person to be protected if he is unable to be present in court.

23 F. The person to be protected shall not be
24 permitted by the court to consent to the appointment of a
25 conservator.

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1 G. The court, at the hearing on the petition for
2 appointment of conservator, shall:

3 (1) inquire into the nature and extent of the
4 functional limitations of the person to be protected; and

5 (2) ascertain his capacity to manage his
6 financial affairs.

7 H. If it is determined that the person to be
8 protected possesses the capacity to manage his estate or
9 financial affairs, or both, the court shall dismiss the
10 petition.

11 I. Alternatively, the court may appoint a full
12 conservator, as requested in the petition, or a limited
13 conservator and confer specific powers of conservatorship
14 after finding in the record based on clear and convincing
15 evidence that:

16 (1) the person to be protected is totally
17 incapacitated or is incapacitated only in specific areas as
18 alleged in the petition;

19 (2) the conservatorship is necessary as a
20 means of effectively managing the estate or financial affairs,
21 or both, of the person to be protected;

22 (3) there are not available alternative
23 resources that enable the effective management of the estate
24 and financial affairs of the person to be protected;

25 (4) the conservatorship is appropriate as the

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1 least restrictive form of intervention consistent with the
2 preservation of the property of the person to be protected;
3 and

4 (5) the proposed conservator is both
5 qualified and suitable and is willing to serve.

6 J. After hearing, upon finding that a basis for
7 the appointment of a conservator has been established, the
8 court shall make an appointment of a conservator. The court
9 shall appoint a limited conservator if it determines that the
10 incapacitated person is able to manage some but not all
11 aspects of his estate and financial affairs. The court shall
12 specify those powers that the limited conservator shall have
13 and may further restrict each power so as to permit the
14 incapacitated person to care for his estate and financial
15 affairs commensurate with his ability to do so.

16 K. A person for whom a conservator has been
17 appointed retains all legal and civil rights except those that
18 have been specifically granted to the conservator by the
19 court. The conservator shall exercise his supervisory powers
20 over the estate and financial affairs of the incapacitated
21 person in a manner that is the least restrictive form of
22 intervention consistent with the order of the court.

23 L. The rules of evidence shall apply and no
24 hearsay evidence that is not otherwise admissible in a court
25 shall be admitted into evidence except as otherwise provided

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1 in the Uniform Probate Code.

2 M A record of the proceedings shall be made if
3 requested by the person to be protected, his attorney or when
4 ordered by the court. Records, reports and evidence submitted
5 to the court or recorded by the court shall be confidential,
6 except that the public shall be granted access to the
7 following information:

- 8 (1) docket entries;
- 9 (2) date of the proceeding, appointment and
10 termination;
- 11 (3) duration of the conservatorship and
12 whether limited or unlimited;
- 13 (4) for a limited conservatorship, the nature
14 of the limitation; and
- 15 (5) the name and other information necessary
16 to identify the alleged incapacitated person.

17 N. Notwithstanding the provisions of Subsection M
18 of this section, any disclosure of information shall not
19 include any diagnostic information, treatment information or
20 other medical or psychological information.

21 [~~N.-~~] 0. The issue of whether a conservator shall
22 be appointed shall be determined by the court at a closed
23 hearing unless the person to be protected requests otherwise.

24 [~~0.-~~] P. Upon request of the petitioner or person
25 to be protected, the court shall schedule a jury trial.

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[P-] Q. Upon entry of an order appointing a conservator, a copy of the order shall be furnished to the person for whom the conservator was appointed and that person's counsel. The order shall contain the name and address of the conservator as well as notice to the person for whom the conservator was appointed of that person's right to appeal the appointment and of that person's right to seek alteration or termination of the conservatorship at any time."

1 FORTY-THIRD LEGISLATURE
2 SECOND SESSION, 1998
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6 February 9, 1998
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8 Mr. Speaker:
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10 Your JUDICIARY COMMITTEE, to whom has been referred
11

12 HOUSE BILL 311
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14 has had it under consideration and reports same with
15 recommendation that it DO PASS.
16

17 Respectfully submitted,
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20 _____
21 Thomas P. Foy, Chairman
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1 FORTY-THIRD LEGISLATURE
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4 Adopted _____ Not Adopted _____

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6 (Chief Clerk)

(Chief Clerk)

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8 Date _____

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10 The roll call vote was 10 For 0 Against

11 Yes: 10

12 Excused: King, Luna, Sanchez

13 Absent: None

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FORTY-THIRD LEGISLATURE
SECOND SESSION, 1998

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FORTY-THIRD LEGISLATURE
SECOND SESSION, 1998

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February 13, 1998

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Mr. President:

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Your JUDICIARY COMMITTEE, to whom has been referred

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HOUSE BILL 311

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has had it under consideration and reports same with
recommendation that it DO PASS.

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Respectfully submitted,

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Fernando R. Macias, Chairman

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FORTY-THIRD LEGISLATURE
SECOND SESSION, 1998

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2 Adopted _____ Not

3 Adopted _____

4 (Chief Clerk)

(Chief Clerk)

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Date _____

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The roll call vote was 7 For 0 Against

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Yes: 7

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No: 0

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Excused: Tsosie

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Absent: None

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